Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE BRIAN BARNETT DUFF, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

v.

GOVERNOR OF THE STATE OF ILLINOIS, DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, and K.L., L.F. & R.B., on behalf of themselves and all persons similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, under 28 U.S.C. § 455(b)(1), a federal district judge must be disqualified if he obtains information about the case in off-the-record discussions with court-appointed experts, conducted with the consent of the parties.

(2) Whether, under this Court's decision in *Liteky v. United States*, 114 S. Ct. 1147 (1994), and 28 U.S.C. § 455(a), a federal district judge can be removed merely because "a reasonable observer would be seriously concerned about the court's ability to conduct the trial impartially," without a finding that the judge's alleged partiality would make a fair hearing or fair judgment impossible.

(3) Whether, under Federal Rule of Appellate Procedure 21, the District Court was denied a fair opportunity to respond to a petition for writ of mandamus where the Seventh Circuit ordered only the real parties in interest to file a response, failed to hold oral argument, and granted the petition without permitting the District Court to respond.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Honorable Brian Barnett Duff, United States District Judge for the Northern District of Illinois, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Seventh Circuit which granted a petition for a writ of mandamus brought by defendants Jim Edgar, Governor of the State of Illinois, and Ann Patla, Director of the Department of Mental Health and Development Disabilities, and issued a writ that removed the District Judge from the case and required its reassignment.

OPINIONS BELOW

The memorandum opinion of the District Court denying the defendant-respondents' motion for recusal, *K.L. v. Edgar*, No. 92 C 5722, slip op. (N.D. Ill. July 2, 1996), is unreported and enclosed in the Appendix. *See* App. 1-23. The opinion of the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"), which granted the petition and issued the writ of mandamus, *In re Edgar*, No. 96-2641 (7th Cir. July 18, 1996) (per curiam) (the "Opinion"), is reported at 93 F.3d 256, and is included in the Appendix. *See* App. 29-41. The Seventh Circuit's order denying rehearing and rehearing *en banc* is appended to the Opinion. *See* App. 41-42.

JURISDICTION

This Court has jurisdiction over the instant petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254. On July 18, 1996, the Seventh Circuit issued a writ

of mandamus pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), and ordered the underlying action reassigned to another district judge. On August 1, 1996, petitioner filed a suggestion for rehearing *en banc*. The Seventh Circuit denied petitioner's suggestion for rehearing *en banc* on August 14, 1996.

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 445 and Rule 21 of the Federal Rules of Appellate Procedure.

Section 455 of the Judicial Code, 28 U.S.C. § 455, states in pertinent part:

> **§ 455. Disqualification of justice, judge, or magistrate.**
>
> **(a)** Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> **(b)** He shall also disqualify himself in any proceeding in the following circumstances:
>
> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> **(e)** No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Federal Rule of Appellate Procedure 21 states as follows:

> **(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.** Application for a writ of mandamus or of prohibition directed to the judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the proscribed docket fee, the clerk shall docket the petition and submit it to the court.
>
> **(b) Denial; Order Directing Answer.** If the Court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.

The proceeding shall be given preference over ordinary civil cases.

(c) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure proscribed in subdivisions (a) and (b) of this rule.

(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Fed. R. App. P. 21.

STATEMENT

In an extraordinary *per curiam* opinion, the Seventh Circuit granted a petition for a writ of mandamus that removed the petitioner, The Honorable Brian Barnett Duff, on the eve of trial, from a case over which he had presided for more than four years. The removal was based upon presumptions made and conclusions reached by the appellate court with respect to the District Judge's off-the-record meetings with experts he had appointed in the underlying case. After observing that whether Judge Duff's meeting with the court's experts "was a disqualifying event depends on what transpired," the panel below inferred from an agenda prepared by the experts that the meeting "touch[ed] the merits, or procedures affecting the merits." App. 31. Further concluding that the "information passed to the judge" during the meeting was

"personal knowledge of disputed evidentiary facts concerning the proceeding" within the meaning of § 455(b)(1), the Seventh Circuit held that disqualification was mandatory; even if the parties had consented to the meeting, they could not waive the objection.

However justified the Seventh Circuit panel below may have felt disqualification of the judge was supported by the facts, or more accurately, the presumptions it made and inferences it drew in the case before it, the decision will wreak havoc in the federal district courts. Among other things, the Opinion will interfere with a district court's discretion to utilize experts under Rule 706 of the Federal Rules of Evidence and to facilitate settlement under Rule 16(f) of the Federal Rules of Civil Procedure. Moreover, the Opinion interprets the disqualification command of § 455(a) in conflict with this Court's majority opinion in *Liteky v. United States*, 114 S. Ct. 1147 (1994), and adopts instead the standards Justice Kennedy advocated in his concurring opinion in that case.

Finally, in its zeal to find Judge Duff disqualified from hearing the case at hand, the court below deprived him of an adequate opportunity to respond to the mandamus petition.

The Seventh Circuit ruled precipitously; failing to adhere to Rule 21 of the Federal Rules of Appellate Procedure, the Seventh Circuit ruled without the benefit of hearing from Judge Duff in any fashion, and granted the petition just three days after the plaintiffs had filed their opposing response. The Seventh Circuit also ruled one day *before* the date on which the District Judge had requested leave to file his response, and did so without ruling on the request.

A. Proceedings Before The District Court.

On August 26, 1992, a plaintiff class of persons who are or will be institutionalized in mental health centers operated by the defendant state officials filed their complaint in this action seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. The complaint alleged that conditions and practices in the defendants' facilities violated and continue to violate the plaintiffs' constitutional rights to safety, freedom of movement, and adequate medical and psychiatric care and treatment.

Two weeks after they filed their complaint, plaintiffs moved pursuant to Federal Rule of Evidence 706 for the appointment of a panel of experts to evaluate their allegations that the defendants' practices. The plaintiffs' motion contended that a panel of court-appointed experts would be helpful in facilitating settlement. Plaintiffs-Respondents Response to Defendants-Petitioners' Petition for Writ of Mandamus, App. 169. Defendants agreed to the motion and, in the Spring of 1993, the plaintiffs and defendants nominated a panel of experts for the District Court's consideration. With the knowledge and consent of the defendants and the plaintiffs, Judge Duff conducted extensive *ex parte* interviews of the experts prior to their appointment. App. 171-72.

On November 10, 1993, the District Court entered an agreed order (the "Agreed Order") appointing a panel of three experts to "investigate the practices, programs and policies of the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) pertinent to conditions of care and treatment for mentally ill persons in the custody of twelve DMHDD facilities." App. 48-50. The

Agreed Order provided that the panel, upon completion of its investigation, would prepare a report that would explain whether, in their expert opinion, the treatment, practices and procedures of the DMHDD represented a "substantial departure from professionally accepted minimum standards, practices and judgments." App. 49.

The Agreed Order also appointed a nationally recognized law professor, Norval Morris, the Julius Kreeger Professor of Law & Criminology, Emeritus, of the University of Chicago Law School, to serve as the Manager of the expert panel. As the Panel Manager, Professor Morris was required to "coordinate and facilitate the investigation and reports of the Panel." App. 51. The Manager's duties also included "facilitat[ing] communications between Panel members, as requested, . . . and report[ing] to the Court and the parties as to the progress and status of the Panel's investigation." *Id.* The Agreed Order further noted that "[b]y appointing the Manager, the Court is not relinquishing its exclusive prerogative to instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report." *Id.*

The Panel engaged in an exhaustive effort lasting over two years, during which time each party expended hundreds of thousands of dollars. During this time, the expert panel met several times with counsel for both parties as well as with officials and personnel of the DMHDD. App. 176. During this same period, Professor Morris met several times with the District Judge to advise him of the status of the panel's efforts. All of these meetings were disclosed to the parties in monthly

reports, which also served to advise the District Judge and the parties on the progress of the panel's efforts. *See, e.g.*, App. 61-64. Copies of these reports were sent to all parties.

On August 10, 1994, the expert panel briefed the parties on their progress, outside the presence of the District Court. That meeting lasted "two and one half hours to discuss a wide variety of topics relevant to the litigation, including a briefing on the expert's progress *and their tentative, general findings thus far.*" Affidavit of Norval Morris, App. 44 (emphasis added). After that meeting, the panel and Professor Morris decided that a meeting with the District Court would be helpful, *see id.*, and in his monthly report sent to all parties, Professor Morris noted the expert panel's intention to conduct a "similar meeting" with the District Judge. *See* App. 62.

This meeting between the panel, Professor Morris and Judge Duff took place on **September 7, 1994**, and on **October 12, 1994** the substance of this meeting was disclosed to the parties in Professor Morris' monthly report. *See* App. 63-64. *Almost two years later*, and despite having been previously told of the intent to conduct a meeting of the panel with the District Judge "similar" to that held with the parties on August 10, the defendants filed their Petition for Writ of Mandamus and argued that this meeting was intended improperly to allow the District Judge an opportunity to preview the evidence he would hear at trial. The Affidavit of Professor Morris submitted in support of the District Judge's Suggestion for Rehearing *En Banc*, however, establishes that no such evidentiary preview occurred. Instead, Professor Morris swears under oath that:

> [a]t this meeting [of September 7, 1994, between the panel and the District Judge], there was no discussion of any substantive aspect of the experts' report other than what was disclosed to the parties in my correspondence of September 8, 1994. The meeting was not designed to provide the district court with an opportunity to "preview" the panel's conclusions or the merits of the case. ***Indeed, no person at this meeting raised or commented on the substance of potential testimony or the conduct of the litigation.***

App. 45 (emphasis added).

The panel issued its draft report in January, 1995, and its findings were not favorable to the defendants. Pursuant to the Agreed Order, the panel received written comments to the draft report from both parties through their counsel. The panel met with the parties to discuss those comments prior to the delivery of the final report. App. 179-80. While the panel completed its final report in June, 1995, in the interest of promoting settlement, it was not publicly released; in fact, both parties did not want the report released, and the Judge agreed.[1]

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[1] The opinions of the panel became a subject of interest among mental health advocacy groups who had followed the progress of the class action. In July 1995, one such group, the Mental Health Association of Illinois ("MHAI"), wrote to Judge Duff and explicitly asked that he make the report public. The MHAI also sent a copy of this letter to plaintiffs' counsel. The District Court responded to this letter, copying plaintiffs' counsel. Letter of The Honorable Brian Barnett Duff to Mr. John Day & Ms. Jan Holcomb of MHAI, App. 65. Judge Duff's letter to the MHAI defended the Governor of Illinois from the group's accusation that the Governor should have provided an official response to the report by that time. Noting that the advocacy

In June, 1996, shortly before the scheduled trial date, defendants filed a motion to recuse the District Judge, stay all proceedings, and continue the trial. App. 188. Defendants' motion accused Judge Duff of judicial bias and partiality, claimed that he had obtained personal knowledge of disputed evidentiary facts and, more ominously, accused Judge Duff of sitting at the center of a conspiratorial strategic alliance that consisted of plaintiffs' counsel, the court-appointed expert witnesses, and advocacy groups. App. 167-68. Despite these serious allegations, which the District Judge strongly denies, the defendants never articulated the precise parameters of the alleged conspiracy, how it worked, what it hoped to

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group's purpose was "political", Judge Duff firmly told the group that it should back off:

> The MHAI at this moment has no role, responsibility or rights in this litigation. The document itself when it was prepared with some of the state mental health officials was improperly given to them and they have been told not to publish it.

App. 66.

The District Court further expressed his disagreement with their view that immediate release of the report should be ordered:

> In due time, we hope to achieve some significant results. In the meantime, I disagree with your feeling that the public or anybody else is entitled to the publication of the expert panel report which is confidential and a working paper for the purpose of either assisting in the negotiation of a consent decree or for possible utilization during trial, if any.

Id.

accomplish, or a single corroborative fact of any agreement of the so-called conspirators. To bolster their accusations, defendants demanded the right to conduct extensive discovery, including taking the deposition of the District Judge, as well as his court personnel, and to examine the court's own notes and documents. Judge Duff denied defendants' motion for recusal in a memorandum opinion dated July 2, 1996. App. 1-23.

The next afternoon, July 3, 1996, after Judge Duff had left town for the Independence Day holiday, defendants filed their fifty-page Petition for Writ of Mandamus Disqualifying District Judge and Emergency Motion for Stay in the Seventh Circuit. App. 76-159.[2] While Rule 21 of the Federal Rules of Appellate Procedure requires appellate courts to order "respondents" to answer the petition by a date certain, one court day later, on July 5, 1996, the Seventh Circuit entered an order requiring only "real-parties-in-interest" to file their response to defendants' petition by Thursday, July 11, 1996. *See* App. 24. On July 8, 1996, plaintiffs filed a motion to extend for fourteen days the date to answer the petition and, after defendants objected, the Seventh Circuit entered an order extending the date for filing such responses until July 15, 1996. App. 25.

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[2] While defendants certified that on July 3, 1996, they served a complete copy of the petition and exhibits on the District Court, defendants in fact failed to do so during regular business hours. Instead, the petition and twenty inches of exhibits were left on the floor unidentified in the corridor outside the district court's chambers for the long holiday weekend.

On July 12, 1996, the District Judge filed an appearance in the Seventh Circuit and filed Respondent's Emergency Motion for Clarification and for Extension of Time for Filing Respondent's Brief. App. 26-28. The emergency motion asked the Appellate Court to clarify whether its July 5, 1996 and July 11, 1996 orders requiring "real-parties-in-interest" to answer the defendants' petition were intended to apply to the District Judge as well as to the plaintiffs. Judge Duff's motion further requested, if the Seventh Circuit's orders were intended to apply to him, that he be allowed until July 19, 1996 to file his response to the petition since he was on trial all day, every day, during this entire time period. Although defendants filed an objection to this motion, *the Seventh Circuit never ruled upon it.*

On July 18, 1996, the Appellate Court granted the petition, and issued a writ of mandamus that ordered the case reassigned to another district judge. It also held that the panel of experts was no longer entitled to "claim the mantle of judicial appointment," even though no party asked it to so rule. App. 40. By ruling with the speed it did, the Opinion preempted the response the District Judge had informed the Seventh Circuit he intended to file, and would have, just one day later, July 19, 1996.

B. The Opinion Below.

The Seventh Circuit's July 18, 1996 Opinion held that "personal knowledge of disputed evidentiary facts" within the meaning of 28 U.S.C. § 455(b)(1) is conferred upon a court by *any* communication that is not on the record nor fully subject to the tools of the adversary process. Such knowledge is "extrajudicial" and once obtained, recusal is required; the parties cannot consent

to *any* substantive *ex parte* communication, nor waive any objection to the district court's further participation in the case.

To support its conclusion that Judge Duff had in fact obtained "personal knowledge of disputed evidentiary facts," the Seventh Circuit adopted an extraordinary presumption: any uncertainty in the record would be construed against the District Judge and in favor of the demand for recusal, even though the Appellate Court preempted any response on these issues from the District Judge. The panel below ruled that the failure to allow the parties to discover his personal deliberations in the management of the case, amounted to an admission by the District Judge that the conversations of which the defendants had been aware for twenty-one months must have been substantive and improper. App. 31 ("To invoke a privilege is therefore to *confess* that the discussions covered the substance of potential testimony and the conduct of the litigation – *and if this is not so in fact, it is nonetheless what we must assume, because no evidence in the record undermines the inferences naturally to be drawn from the outline for the September 7 meeting.*") (emphasis added); *see also id.* ("We cannot know, because the district judge has blocked discovery from other participants and has declined to state on the record his own memories of what happened."); App. 34 ("What information passed to the judge, and how reliable it may have been, are now unknowable."). *But see infra* note 9 (citing to record below where Judge Duff disclosed his recollection of the September 7 meeting).

Having presumed that Judge Duff's communications with the expert panel were substantive, and that these conferred personal knowledge upon the District Court

within the meaning of § 455(b)(1), the Appellate Court went on to rule that any substantive knowledge about a case obtained by a district judge in an off-the-record proceeding is extrajudicial:

> The point of distinguishing between "personal knowledge" and knowledge gained in a judicial capacity is that information gathered from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." . . . Off-the-record briefings in chambers . . . leave no trace in the record – and in this case the judge has forbidden any attempt at reconstruction. What information passed to the judge, and how reliable it may have been, are now unknowable. *This is "personal" knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated.*

App. 34 (emphasis added).

The Seventh Circuit cited no support for these new definitions of "personal knowledge" and "extrajudicial" knowledge.

The Opinion below also concluded that disqualification of Judge Duff was indisputably required by § 455(a). In doing so, however, the Appellate Court ignored *Liteky*'s requirement that recusal under § 455(a) requires a finding that the alleged bias or partiality of the district judge made a fair trial impossible. The Seventh Circuit made no attempt at such a finding and, on the record presented, could not have done so.

Not content simply to remove the District Judge from the case, the Seventh Circuit went further and granted defendants relief they never requested. Without citing

any authority, the panel below ruled that "the panel can no longer claim the mantle of judicial appointment" and held that the panel members were no longer court-appointed experts. App. 40. Although leaving to the successor district judge the decision of whether to allow these witnesses to testify, the practical effect of the ruling was to prevent such judge from considering their opinions, and their work product. Indeed, even any admissions the defendants made in their interviews with the experts are now barred.[3]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Seventh Circuit's Opinion imposes a legacy of two new rules that *require* disqualification of a federal district court judge under 28 U.S.C. § 455. In particular, the Opinion holds that:

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[3] The district judge to whom this case is now assigned so read the decision and adopted the Seventh Circuit's credibility determinations. He has barred these experts from testifying as opinion witnesses and barred any use of their work and interviews, even by subsequent experts:

> I have looked over the Seventh Circuit's opinion, and as far as I am concerned, Leona Bachrach, Martha Knisley, and Dr. Okin, the panel of expert witnesses that Judge Duff appointed, I am going to discharge them. I am going to bar them from testifying in this case. It seemed to me the Seventh Circuit questioned their objectivity and their credibility, and they became advocates rather than expert witnesses. So the three of them are no longer going to be in this case, nor is either side going to be allowed to call them as expert witnesses.

Report of Proceedings Before the Honorable James H. Alesia at 6-7, App. 231.

(1) any information a federal judge learns that is not on the record, and "which can be neither accurately stated nor fully tested" nor controverted by the tools of the adversary process, constitutes "personal knowledge of disputed evidentiary facts" requiring disqualification under § 455(b)(1); and

(2) conduct of a judge that "would cause a reasonable observer to be seriously concerned about the court's ability to conduct the trial impartially" is sufficient to require disqualification under § 455(a), even though such conduct is not found "to make fair judgement impossible."

The first ruling of the Seventh Circuit conflicts with the decisions of other courts of appeal and makes improper, practices that judges throughout the federal system commonly follow. The second ruling squarely conflicts with this Court's holding in *Liteky v. United States*, 114 S. Ct. 1147 (1994), and adopts the position of Justice Kennedy in his concurring opinion in that case. Because of the great need for certainty in this area of the law throughout the federal system, this Court should grant *certiorari* to settle these issues.

I. THE OPINION'S NEW DEFINITION OF "PERSONAL KNOWLEDGE" UNDER 28 U.S.C. § 455(B)(1) CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS, WITH THE COMMON PRACTICE OF FEDERAL JUDGES EVERYWHERE, AND WITH CANON 3(A)(4) OF THE CODE OF JUDICIAL CONDUCT.

Without citation to authority, the Seventh Circuit has crafted a new rule expanding the meaning of "personal knowledge," as that term is used in 28 U.S.C. § 455(b)(1), to include information about a case learned by a district

judge in "[o]ff-the-record briefings in chambers . . . [that] leave no trace in the record," *even if the judge obtained this information with the consent of the parties*. The Appellate Court further held that the receipt of such information mandates recusal of the judge. App. 34-35. In so holding, the Opinion conflicts with decisions by other circuit courts of appeal and seriously jeopardizes the ability of district courts to use court-appointed experts and to facilitate settlements.

Unlike the Opinion below, other federal circuit courts have accorded the term "personal knowledge" its common evidentiary meaning, *e.g.*, "an impression derived from the exercise of his own senses, not from the reports of others – in other words, [personal knowledge] must be founded on personal observation." *See United States v. Evans*, 484 F.2d 1178, 1181 (2d Cir. 1973) (quoting 2 Wigmore, Evidence § 657 (3d ed. 1940)); *see also Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989) (report of expert witness did not constitute "personal knowledge" for purposes of summary judgment); Advisory Comm. Note, Fed. R. Evid. 602 ("personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception"); *cf. Laird v. Tatum*, 409 U.S. 824, 826-27, 93 S. Ct. 7, 9-10 (1972) (Rehnquist, J., in chambers opinion) (then-Justice Rehnquist concluding that his own expert testimony before Congress did not imbue him with personal knowledge of underlying facts because he was not a "material witness").

Numerous courts have held that a district judge cannot gain "personal knowledge of disputed evidentiary facts," as proscribed by § 455(b)(1), from discussions with a court-appointed expert; since such communications

arise in the course of judicial proceedings, they do not mandate recusal. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 184 (2d Cir. 1991) (information acquired by district court's *ex parte* discussions with court-appointed housing expert was acquired in "judicial capacity" and did not mandate recusal under § 455(b)(1)); *United States v. Phillips*, 664 F.2d 971, 1004 (5th Cir. 1981) (*ex parte* communications with prosecutor regarding threats to disrupt proceedings were "ancillary proceeding which were inseparable from [the] case"), *cert. denied*, 457 U.S. 1136 (1982); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1231, 1241 (D.N.M. 1990) (*ex parte* phone conversations with court-appointed expert "arise in a judicial context" and do not require recusal under § 455(a)); *Wolyn v. Livingston*, 1995 WL 685971 (No. 93 Civ. 0618 (TPG)) (S.D.N.Y. Nov. 16, 1995) (*ex parte* communications with court-appointed trustee, in which the trustee reported results of its investigation to the judge, are facts obtained in course of judicial duty and do not constitute personal knowledge under § 455(b)(1)).[4]

Disregarding these precedents, the Court below held that what the District Judge learned in the challenged meeting with his appointed experts was " 'personal knowledge' no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated." App. 34-35.

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[4] Conversely, a judge *does* obtain personal knowledge when he personally observes facts that are disputed in a case before him. *See, e.g., United States v. State of Alabama* 828 F.2d 1532, 1544-46 (11th Cir. 1987) (removing judge from case in which he was required to "make factual determinations about bills and legislative fights in which he played an active part" as former member of the legislature), *cert. denied*, 487 U.S. 1210 (1988).

Such a rule cannot and should not be the law. It would wreak havoc with the right to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." *In re Peterson*, 253 U.S. 300, 312, 40 S. Ct. 543, 547 (1920); *see also* Fed. R. Evid. 706. According to a recently conducted survey of federal judges, two-thirds of those responding reported that they had *ex parte* communications with experts appointed under Rule 706. *Reference Manual on Scientific Evidence*, Court Appointed Experts at 550 (Federal Judicial Center, 1994). In recognition of the usefulness that such communications have for district courts, the *Manual on Scientific Evidence* cautions that:

> A broad prohibition of ex parte communications between a judge and a court-appointed expert *would impede necessary communication when the expert is appointed to serve a technical advisor to the court* [footnote omitted], a role analogous to that of a judicial clerk.

Id. at 549 (emphasis added).

The Opinion below effectively bans *all ex parte* meetings of any consequence between a district judge and his or her appointed experts. As the panel held, "[w]hether the meeting was a disqualifying event depends on what transpired . . . Did any meeting between judge and experts touch the merits or procedures affecting the merits?" App. 31. By so framing the inquiry, the Opinion opens the door for every disappointed litigant to depose the district judge, as defendants here attempted, and literally to put the court on trial. Mandatory recusal

would follow.[5] A rule that would eliminate the common practice of federal judges everywhere to meet *ex parte* with their appointed experts should be promulgated only by this Court, which has yet to address the use of court-appointed experts under Rule 706 or pursuant to the inherent powers of the district court.

The mischief of the Seventh Circuit's Opinion cannot be confined to discussions with court-appointed experts. While the Opinion reasons only in that context, a logical consequence of the new rule would emphatically diminish a district court's ability to foster settlement. It is a common and encouraged practice for a judge to meet privately with each party during settlement discussions, which inevitably touch the merits of the dispute.[6] Canon 3A(4) of the Code of Judicial Conduct expressly acknowledges the right of a judge to engage in *ex parte* discussions to facilitate settlements:

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[5] The new Seventh Circuit rule will also have a chilling effect on an expert's willingness to accept appointment by the court. Why would an expert wish to devote his or her time to such projects when the expert could be dismissed upon the whim of a disappointed party, and where the expert could be labeled as having acted improperly for simply meeting with the appointing judge.

[6] The practical benefits of judicial involvement in settlements are noted in the *Manual for Complex Litigation* which suggests that parties may profitably employ "confidential discussions with judge," where the "judge can point out weaknesses without fear of compromising a party's position in the eyes of opposing counsel," and "may be able to suggest areas of possible agreement, *without revealing confidences.*" *Manual for Complex Litigation (Third)* § 23.13 (1995) (emphasis added).

> A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

114 S. Ct. at 327.

The Opinion, however, changes this practice. It allows a disappointed litigant, or one who is disappointed in settlement talks and now believes too much information was revealed to the court, to demand recusal of the judge.[7] If such a common practice in the federal courts is to be eliminated, it should only be through the authority of this Court. Because of the broad impact the Opinion below will have on the way in which district judges in the Seventh Circuit and elsewhere manage their cases, the petition should be granted.

II. IN CONFLICT WITH THIS COURT'S DECISION IN *LITEKY*, THE OPINION BELOW HOLDS THAT A DISTRICT COURT JUDGE CAN BE REMOVED UNDER § 455(A) WITHOUT A FINDING THAT FAIR JUDGMENT WOULD BE IMPOSSIBLE.

Although the Opinion found that removal of Judge Duff from the case was mandated principally by

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[7] The Opinion thus overrules decisions like *Geneva Assurance Syndicate Inc. v. Medical Emergency Servs. Assocs.*, 1993 U.S. Dist. LEXIS 13525 (N.D. Ill. Sept. 27, 1993), where the district court denied a motion for recusal under § 455(b)(1) based on the court's alleged "personal knowledge" obtained from participating in over twenty settlement conferences over a year long period, with the consent of the parties. The Opinion would undermine, if not eliminate, a district court's general authority to work with parties to settle cases. *See, e.g., G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 651-53 (7th Cir. 1989).

§ 455(b)(1), and perhaps concerned that its unprecedented definition of "personal" and "extrajudicial" knowledge might not pass muster, the panel also expressed its belief "that disqualification is independently required by 28 U.S.C. § 455(a)." App. 35. In so holding, and *without finding* that the District Judge "display[ed] deep-seated favoritism or antagonism that would make fair judgment impossible," the panel neglected to follow this Court's ruling in *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994). Instead, the Opinion adopted the approach advocated by the concurring opinion of Justice Kennedy, *see id.* at 1159, that the "impossibility of fair judgment" standard be discarded. This, in turn, creates an irreconcilable conflict with the decisions of other circuit courts of appeal as well as with this Court's decision.

This Court's majority opinion in *Liteky* teaches that the key inquiry of recusal under § 455(a) is whether a fair trial is impossible. In particular, whether it involves either "opinions formed by the judge on the basis of . . . events occurring in the course of the current proceedings," judicial remarks, or *both*, such opinions or remarks must "display a deep-seated favoritism or antagonism that would make fair judgment impossible." 114 S. Ct. at 1157. In his concurring opinion, Justice Kennedy disagreed with this standard:

> The Court's "impossibility of fair judgment" test bears little resemblance to the objective standard Congress adopted in § 455(a): whether a judge's "impartiality might reasonably be questioned." . . .
>
> . . . .

> . . . [I]t seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake.

Id. at 1161-62.

In adopting the "impossibility" test, this Court chose *not* to adopt Justice Kennedy's formulation. Numerous circuit courts properly have followed *Liteky*'s majority holding that a district judge may be recused under § 455(a) only when there is a finding that an objective observer would conclude that fair judgment is impossible. *See Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550, 557 (Fed. Cir. 1996) (recusal on basis of judicial conduct under § 455(a) requires finding that, under an objective standard, fair judgment would be impossible), *petition for cert. filed* August 20, 1996 (No. 96-287); *Groden v. Random House, Inc.*, 61 F.3d 1045, 1053 (2d Cir. 1995) (alleged bias originating from judicial source requires finding that fair judgment would be impossible); *United States v. Antar*, 53 F.3d 568, 574 (3d Cir. 1995) (section 455(a) mandates objective inquiry that fair judgment impossible when alleged bias stems "from facts gleaned during judicial proceedings themselves"); *United States v. Young*, 45 F.3d 1405, 1415 (10th Cir.) (same as *Groden*), *cert. denied*, 115 S. Ct. 2633 (1995); *In re Larson*, 43 F.3d 410, 413 (8th Cir. 1994) (same); *United States v. Chischilly*, 30 F.3d 1144, 1149 (9th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 946 (1995); *see also United States v. Jordon*, 49 F.3d 152, 155 n.3 (5th Cir. 1995) (if allegations of bias arise from judicial proceeding, impossibility of fair judgment standard "implicated").

One must presume that the Opinion below cited *Liteky* with full knowledge of both this Court's majority holding and Justice Kennedy's concurring opinion. Accordingly, it is fair to conclude that the Opinion consciously rejected the "impossibility of fair judgment" test, opting instead to follow Justice Kennedy's concurrence. In so doing, the panel adopted a new test, under which a potential compromise of impartiality or a serious concern of partiality will suffice:

> A thoughtful observer . . . would conclude that a preview of evidence by a panel of experts who had become partisans carries an *unacceptable potential* for compromising impartiality.
>
> . . . .
>
> Additional statements by the judge also would cause a reasonable observer to be *seriously concerned* about the court's ability to conduct the trial impartially.

App. 35-36 (emphasis added).

Under *Liteky*, the panel's findings were insufficient to support removal of the District Judge under § 455(a). If the standard is now an "unacceptable potential" or a "serious concern" about impartiality, this Court should pronounce that standard. Accordingly, petitioner respectfully requests that this Court grant the petition and issue a writ of *certiorari* to rectify the Seventh Circuit's departure from the *Liteky* standard, thereby resolving the conflict the Opinion creates with decisions from other circuit courts on this issue.

III. THE SEVENTH CIRCUIT DEPRIVED THE DISTRICT JUDGE OF HIS PROCEDURAL RIGHT TO BE HEARD PURSUANT TO RULE 21 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 21 of the Federal Rules of Appellate Procedure provides procedural safeguards designed to ensure that a district judge has a fair opportunity to respond to a petition for a writ of mandamus. With extraordinary and unnecessary haste, the Seventh Circuit preliminarily determined, one business day after it was filed, that the petition at issue here merited a response. With similar celerity, the Seventh Circuit ruled on the petition three days after the "real-parties-in-interest" filed their answer and one day before the date the District Judge sought leave to file his answer. Proceeding in this manner violated Rule 21 and deprived Judge Duff of a fair opportunity to be heard.

Rule 21 requires that if an appellate court is not of the opinion that the petition for writ of mandamus should be denied, the court shall "order that an answer to the petition be filed by the *respondents*." (emphasis added). Rule 21 explicitly provides that the district judge is a "respondent" within its meaning. Rule 21(b) further provides that the clerk of the Court of Appeals shall serve the order requiring the *respondents* to answer upon the respondent judge and that the clerk also "shall advise the parties of the dates on which briefs are to be filed, if briefs are required, *and of the date of oral argument.*" *Id.* (emphasis added). The orders entered by the Seventh Circuit directing the "real-parties-in-interest" to answer the petition did not comply with Rule 21. By requesting responses only from the litigants, by failing to hold oral argument, and by issuing its writ of mandamus after

receiving the litigant's briefs and before informing the District Judge whether and when he should respond, the Seventh Circuit panel deprived Judge Duff of his unqualified right, *and duty*,[8] to respond to the defendants' attack upon his refusal to recuse himself in the case.

The lack of an opportunity to be heard is of significant importance here. At several critical points in its Opinion, the panel *presumes* certain allegations made against Judge Duff were true, despite the fact that the District Court did not have the opportunity to answer the allegations. The plain language of Rule 21 precludes such presumptions by explicitly stating that even if a district court declines to participate in the proceedings, the allegations of the petition shall not be deemed admitted. *See* Fed. R. App. P. 21(b). Even in the context of a direct appeal, courts have refrained from presuming facts against a federal judge, opting instead to remand for an evidentiary hearing before another district judge to resolve any factual uncertainties. *See Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) (remanding for evidentiary hearing to determine whether judge deliberately gathered facts outside the record, and thereby obtained personal knowledge of disputed evidentiary facts concerning the proceedings), *appeal after*

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[8] "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989) (denying petition for writ mandamus seeking disqualification of district judge under § 455); *see also Laird v. Tatum*, 409 U.S. 824, 837, 93 S. Ct. 7, 14-15 (1972) ("Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*.").

remand, 649 F.2d 416, 419-20 (6th Cir.) (concluding on appeal after remand for evidentiary hearing that judge was not improperly influenced by fact-finding of clerk), *cert. denied*, 454 U.S. 1099 (1981). The Opinion's improper and inaccurate presumptions – and the disturbing speed with which the panel ruled on the petition – deprived the District Judge of a fair opportunity to be heard on these very issues. That was not only unfair, it was unjust and unbecoming.

Nor was there any apparent need for the great speed with which the Seventh Circuit acted; it could have allowed itself, the parties and the District Judge more time by granting Respondents' motion to stay the proceedings in the trial court. At the very least, the Seventh Circuit could have granted the District Judge's motion for clarification filed on Friday, July 12, 1996, which requested until the following Friday, July 19, 1996, to respond to the petition; the extraordinary writ was granted on Thursday, July 18, 1996, without ever hearing from Judge Duff. Indeed, any of these vehicles – including oral argument – would have allowed Judge Duff to explain why the key assumptions of fact made by the Seventh Circuit at defendants' behest were erroneous. The District Judge's explanation on the record,[9] as well as

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[9] On June 18, 1996, the District Court fully explained on the record its recollection of the September 7, 1994 meeting. The District Court clearly stated that it only informed the experts and Professor Morris that whatever form the experts' opinion took, it at least had to have a scientific methodology. After the parties had invested several years and several hundred thousands of dollars in the expert's report, the District Judge reminded them of the panel's obligations, as well as his own:

Professor Morris' Affidavit, establish that Judge Duff did not surreptitiously entertain any substantive discussions about the merits with the experts concerning their report. The meeting was promptly disclosed to the parties in the routine monthly reports Professor Morris distributed to all the parties.

> Now, if indeed Professor Morris told them "You're going to have to show the judge that you have a scientific methodology," that wouldn't have been because I was trying to be influenced on the case, *that's because I was trying to serve both of you in our efforts to settle this report and get a decent proposal out that wouldn't be attacked by the press and the legislators and a lot of other people that you're going to need.*

Pet. App. Ex. (III) C, at 44 (emphasis added). Judge Duff further disclosed on the record that he never told the experts what they should say or how they should support their opinions:

> Now if you want – you can try to attack their methodology if you want, that's fair. Your experts may say "That's not the way they should have done it," and they will say "Well, I think this is the way we should have done it."
>
> *I didn't tell them what to do. They decided on their methodology. Rule 26 tells you and the Daubert decision tells you that you can examine their methodology.*

Pet. App. Ex. (II) K, at 37 (emphasis added). Accordingly, contrary to the Seventh Circuit's conclusion, *see* App. 31, the District Court *did* divulge its recollection of the September 7, 1994 meeting on the record.

In other situations, a court's statement on the record has ended the inquiry. *See, e.g., Schurz Communications v. F.C.C.*, 982 F.2d 1057, 1061 (7th Cir. 1992) (Posner, J., in chambers) (because judge has "no recollection of having received information from any source other than public documents," motion for recusal denied).

Failing to give a district court judge an opportunity to respond to petition for a writ of mandamus is a recognized reason for vacating the grant of a writ. In *In re Repetitive Stress Injury Litigation*, 35 F.3d 637 (2d Cir. 1994), for example, the Second Circuit vacated its earlier grant of a writ to allow the district court judge an opportunity to determine whether he wished to participate in the appellate proceedings. *Id.* at 639. In that case, and in apparent consideration of the district court's schedule, the Second Circuit granted the district judge 10 days to notify the clerk if he intended to file such papers and 30 days to file whatever papers he chose to file. *Id.* at 640. Consistent with the *In re Repetitive Stress* decision, this Court should grant the petition for *certiorari*, vacate the grant of the petition for writ of mandamus, and permit the District Judge an adequate and full opportunity to respond to the petition.

CONCLUSION

For all these reasons, the petition for a writ of *certiorari* should be granted.

Dated: Chicago, Illinois
November 22, 1996

Respectfully submitted,

The Honorable Brian Barnett Duff

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